No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE GOVERNMENTS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE KINGDOM OF THE NETHERLANDS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the issue of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question or a question of subject-matter jurisdiction.

2. In a federal common law action brought under the ATS, whether corporations are not liable for torts committed in violation of the "law of nations", as the Court of Appeals decision provides, or whether they can be held liable under the normal U.S. rules for domestic tort cases.

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INTERESTS OF *AMICI CURIAE*

The Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands ("the Governments") are committed to (i) the promotion of, and protection against violations of, human rights and (ii) the rule of law, domestically and internationally.[1]

The Governments' policy is that companies should behave with respect for the human rights of people in the countries where they do business.[2] They also believe that the most fair and effective way to achieve progress in this area is through multilateral agreement on standards, achieved through multilateral cooperation with other States, and then the effective national implementation of those standards. It is then for countries to regulate and control business operations in their territories to ensure they meet the implemented standards. The Governments also believe in the efficacy of engagement with corporations and have been leading supporters of, and participants in, multilateral initiatives to ensure better corporate engagement on human rights issues around the world.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae state that no counsel for a party authored this brief in whole or in part and that no person or entity other than Amici Curiae, its members, and its counsel contributed monetarily to the preparation or submission of this brief. Both Petitioners and Respondents have granted their consent to the filing of all amicus briefs.

[2] *See* Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011) available at http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf.

The Governments have maintained over a long period of time their opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged activities in foreign jurisdictions that caused injury. This position is not one that has been lightly adopted by the Governments. It is based on their concern that such exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts. The Government of the United Kingdom ("U.K. Government") also submitted an amicus brief arguing against the exercise of U.S. extraterritorial jurisdiction in *Morrison v. National Australian Bank Ltd.*, 130 S.Ct. 2869 (2010) ("*Morrison*"), in which the Court unanimously rejected U.S. jurisdiction over the foreign investor-plaintiffs' claims against a foreign securities issuer, holding that the federal securities laws do not reach disputes involving only foreign issuers and investors.[3] In addition, the Governments filed a joint amicus brief making a similar argument in *F. Hoffman-La Roche v. Empagran, Ltd.*, 542 U.S. 155 (2004) ("*Empagran*"), where this Court and, on remand, the D.C. Circuit, read the Foreign Trade Antitrust Improvements Act of 1982 as excluding most foreign purchasers' claims for foreign injuries. 417 F.3rd 1267 (D.C. Cir. 2005).[4]

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[3] *Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, Morrison v. National Australian Bank Ltd.* (Brief filed February 26, 2010) (No. 08-1191), 2010 U.S. S. Ct. Briefs LEXIS 174.

[4] *Brief of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, F. Hoffman-La Roche v. Empagran, Ltd.* (Brief filed February 3, 2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 104.

The Governments remain deeply concerned about the failure by some United States courts to take account of the jurisdictional constraints under international law when construing the ATS, which in turn has led those courts to entertain suits by foreign plaintiffs against foreign defendants for conduct that entirely took place in the territory of a foreign sovereign. In this regard, the U.K. Government recently filed, jointly with the Government of Australia, an amicus brief in support of the writ of certiorari being sought by the Petitioner in *Rio Tinto PLC v. Alexis Holyweek Sarei, et al., pet. for cert. filed*, (Nov. 23, 2011) (No. 11-649) *("Rio Tinto")*.[5] This is the same

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[5] *Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions in their Petition for a Writ of Certiorari, Rio Tinto PLC and Rio Tinto Limited v. Alexis Holyweek Sarei, pet. for cert. filed*, (No. 11-649) (Brief filed December 28, 2011). The U.K. Government (jointly with the Government of Australia) had previously submitted two amicus briefs when the *Rio Tinto* case was still before the Ninth Circuit Court of Appeals. *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees'/Cross-Appellants' Motion for Rehearing En Banc, Sarei v. Rio Tinto, PLC*, 550 F. 3d 822 (9th Cir. 2008) (Brief filed May 24, 2007) (Nos. 02-56256, 02-56390) and *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland and the Commonwealth of Australia as Amici Curiae in Support of the Defendants-Appellees/Cross-Appellants, Sarei v. Rio Tinto, PLC*, 2011 U.S. App. LEXIS 21515 (9th Cir. Oct. 25, 2011) (Brief filed December 16, 2009). In both briefs, the two Governments urged the Court of Appeals to apply jurisdictional limitations recognized in international law and by this Court in *Sosa*. This position was ultimately rejected by a 6-5 vote of the en banc Court of Appeals. *Sarei v. Rio Tinto, PLC*, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (en banc), *pet. for cert. filed* (Nov. 23, 2011) (No. 11-649).

fundamental concern that the U.K. Government had first expressed (together with the Governments of Australia and Switzerland) in their joint amicus brief to this Court in *Sosa v. Alvarez – Machain*, 542 U.S. 692, 712 (2004) ("*Sosa*")[6], where this Court ruled that the ATS provided jurisdiction for only a "very limited category" of claims by alien plaintiffs for injuries suffered outside the United States.

The Governments consider that, when a domestic court in any country is trying to determine whether a norm of customary international law exists, it must do so in accordance with the established rules of international law – *i.e.*, it must analyze whether there is a widespread and consistent practice of States (State practice), and the belief that compliance is obligatory under a rule of law (*opinio juris*). Both State practice and *opinio juris* may be identified through international treaties, court decisions, and the writings of respected jurists.

The Governments are filing this joint amicus brief to (i) reemphasize the basic issues of international law raised by the Questions Presented in this case, and (ii) remind this Court of the need to clarify the principles of international law that should preclude U.S. courts from exercising jurisdiction in these extraterritorial ATS cases involving foreign plaintiffs' claims against foreign defendants concerning foreign activities.

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[6] *Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioner, Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Brief filed January 23, 2004) (No. 03-339), 2004 U.S. S. Ct. Briefs LEXIS 910.

STATEMENT OF THE CASE

This case (which is quite different from *Sosa* factually[7]) is typical of the ATS cases that have proliferated in the lower courts, particularly in the Second and Ninth Circuits, since 2004. U.S. class action counsel have assembled a class of foreign citizens or residents who have allegedly been injured by actions of a foreign government in its own territory; most of the defendants in these cases are foreign corporations that are alleged to have encouraged, assisted, or participated in the foreign government's activities.[8] Generally, as here, the challenged conduct has no nexus with the United States. The corporations are the principal targets of these cases because claims against foreign states or governments would be dismissed on grounds of sovereign immunity.

SUMMARY OF ARGUMENT

Careful adherence to the established rules of international law is necessary to resolve many recurring questions arising in cases brought under the ATS.

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[7] *Sosa* was a suit by a single individual for mistreatment at the hands of Mexican individuals alleged to be acting on behalf of U.S. drug enforcement agents.

[8] *See, e.g., Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F. 3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010); *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011WL 5041927 (9th Cir. Oct. 25, 2011) (en banc), *pet. for cert. filed*, (Nov. 23, 2011) (No. 11-649); and for numerous other examples *see* footnotes 32 and 34 of the Petitioners' brief which appear on pages 40 and 41. A few of these class action ATS cases involve a U.S. company, rather than a foreign one, as the principal defendant. *E.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

These questions relate to both substantive liability and the jurisdiction of the U.S. courts over foreign injuries suffered abroad.

The present case, which is typical of most ATS class action cases, offers this Court the chance to resolve the basic question of whether a tort case based on an alleged violation of the "law of nations" can be brought against a corporation.

If the Court determines that the question of corporate liability should be resolved on the basis of international law, then the Governments submit that the answer is clear. Under contemporary international law, no liability exists for corporations. International law deals principally with relations between States, and does not impose duties directly on corporations. Most ATS claims are based on alleged violations of either international human rights law or international criminal law. However, international human rights law is based on obligations that are imposed on States, most often by treaties. While in certain circumstances, specific obligations may require States to regulate corporations in particular ways, this cannot be evidence that international law imposes liabilities on corporations.

Since World War II, States, through the use of international law instruments, have also imposed liabilities on individuals for war crimes. But none of the relevant treaties in the international criminal law field or decisions by international criminal tribunals impose any form of liability directly on corporations. It is also of particular significance that the creators of the International Criminal Court deliberately confined its jurisdiction to individuals. Thus, international criminal law provides no support for the assertion that corporations should directly be

subject to civil liability as a matter of international law for violations of the "law of nations."

If the Court determines that the corporate liability question under the ATS is a question of U.S. domestic law, that would be a decision on U.S. law on which the Governments take no position. However, such a decision would then magnify the importance of the broader underlying question of whether international law bars these ATS cases involving foreign parties, foreign conduct and – often – foreign governments, from being brought in the U.S. courts. This Court has recently articulated a strong presumption against the extraterritorial application of U.S. statutes, as being part of the U.S. obligation to apply international law as part of its domestic law. The Governments see no reason why such an international law-based presumption should not be equally applicable to common law decision-making by U.S. judges.

ARGUMENT

I. CAREFUL ADHERENCE TO THE ESTABLISHED RULES OF INTERNATIONAL LAW IS NECESSARY TO RESOLVE MANY RECURRING QUESTIONS ARISING IN CASES BROUGHT UNDER THE ALIEN TORT STATUTE

This Court has long recognized that the sources of customary international law "may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).[9] Such sources are

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[9] In 2004, when this Court had to deal with its first modern ATS case in *Sosa*, this Court recognized that: "[W]here there is

fundamental to determining the two constituent elements of customary international law: the widespread and consistent practice of States (State practice), and the belief that compliance is obligatory under a rule of law (*opinio juris*). The Governments submit that no less careful approach should be taken to the question that the Court may choose to consider in the current case: whether the liability of corporations has been generally recognized as a matter of international law.

International law also determines whether a national court may have extraterritorial jurisdiction to decide the kinds of offshore disputes that arise in nearly all post-*Sosa* ATS cases. It has been the Governments' consistent view that the U.S. courts should not be host to disputes among foreign citizens or corporations over alleged wrongs committed abroad, including those committed by (or at the behest of) a foreign government, where no factual nexus to the U.S. exists. This case is just such an example, as is *Rio Tinto*. Each involves a class of foreign residents suing a foreign corporation for allegedly assisting a foreign government in mistreating them in its own territory, and does not provide any recognizable basis for the exertion of jurisdiction by the U.S. courts under international law. In the present case, the

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no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

Court of Appeals and now this Court have chosen to deal with the important question of corporate liability, while leaving to the side the far more fundamental threshold question of whether the dispute should even be in a U.S. court.

Good motives on human rights do not justify any government or any court ignoring basic international law requirements, including those related to the limits on national jurisdiction. It has been this Court's oft-repeated holding in *The Paquete Habana*, 175 U.S. 677 (1900), that "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700. Where customary international law has to be applied by the domestic courts of England and Wales, Blackstone's Commentary holds true: "the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[10] Nevertheless, "any alleged rule of international law must be proved a valid rule, and not merely an uncorroborated proposition," before being applied by national courts.[11] The Governments consider that customary international law simply does not support a finding by this Court that corporations would be liable *as a matter of international law* when they engage in conduct that would be a violation of customary international law if done by a state. Moreover, international law rules on jurisdiction are generally well established and should be applied by

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[10] 4 William Blackstone, *Commentaries*, 67.

[11] Malcolm N. Shaw, *International Law*, 144 (6th ed. 2008).

this Court in matters concerning foreign parties and conduct, as they have been consistently applied by the domestic courts of other States.

The Governments respectfully and strongly urge that this Court give great deference to the underlying rules of international law as it decides the quite particularized issues generated in *Kiobel, Rio Tinto* and other individual ATS cases.

II. THE FOCUS OF CUSTOMARY INTERNATIONAL LAW IS ON OBLIGATIONS OF STATES AND, MORE RECENTLY, CRIMINAL LIABILITY OF INDIVIDUALS; INTERNATIONAL LAW DOES NOT IMPOSE DIRECT LIABILITY ON CORPORATIONS

The Governments do not express any view about how this Court should decide the choice of law question presented by this case of whether the ATS should be read as providing a domestic tort law remedy against corporations for conduct that breaches substantive international rules when done by a State. However, if this Court considers that the nature and scope of liability under the ATS must be determined by international law itself,[12] then the Governments respectfully urge that this Court look to the recognized international law rules to determine whether a rule of corporate liability exists under customary

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[12] In 2004, when this Court dealt with ATS for the first time in modern history in *Sosa*, it suggested that the federal courts would have to consider "whether international law extends the scope of liability for violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732, n. 20. Justice Breyer elaborated on the issue in his concurring opinion: "The norm [of international law] must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue." *Id.* at 760.

international law. The Governments' position is that neither of the constituent elements of customary international law – widespread State practice and *opinio juris* – can be identified to support such a finding. Instead, the Governments agree with the judgment by the Second Circuit Court of Appeals that "in the absence of sources of international law endorsing (or refuting) a norm, the norm cannot be applied in a suit *grounded on customary international law* under the ATS." 621 F.3d at 121 (emphasis added).

A. Customary International Law Does Not Attribute Direct Liability to Corporations

Customary international law is founded on a broad international consensus, which is based on "evidence of a general practice accepted as law."[13] In an often-quoted passage, the International Court of Justice has stated that for a rule of customary international law to be created:

> An indispensable requirement would be that... State practice, including that of the States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; –and should moreover have occurred in such way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20); *see also Restatement (Third) of the Foreign Relations Law of the United States*, § 102, cmt. 1 (1987) ("[C]ustomary

[13] Statute of the International Court of Justice, Art. 38.

international law results from a general and consistent practice of states followed by them from a sense of legal obligation").

The House of Lords made the same essential point in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, [1990] 2 A.C. 418 (H.L.), when rejecting an asserted rule of international law that would have imposed on States – as members of an international organization – joint and several liability for payment of its debts when the organization had defaulted. As Lord Oliver explained:

> A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is generally accepted by the body of civilised nations; and it is for those who assert the rule to demonstrate it . . . *It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.*

Id. at 513 (emphasis added).

As British jurist Lord Bingham has emphasized in another context, new rules of customary international law are deliberately made difficult to establish:

> The means by which an obligation becomes binding on a state in international law seem to be quite as worthy of respect as a measure approved...by a national legislature. This is true of treaties to which, by signature and ratification, the state has formally and solemnly committed itself. It is true of "international custom as evidence of a general practice accepted by law", since the threshold condition – very wide-

> spread observance, as a matter of legal obligetion – is not easily satisfied.[14]

Moreover, the International Court of Justice has cautioned, "[I]nstances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98, para. 186 (June 27). The methodology of determining what constitutes a new rule of international law is therefore – as this Court is well aware – no straightforward matter and requires painstaking analysis to establish whether the necessary elements of State practice and *opinio juris* are present. These statements apply both to the contents of the rule and the establishment of jurisdiction over causes of action based on the rule.

At present, it is well established that the focus of customary international law has been on the responsibility of States for internationally wrongful acts and, since World War II, on the criminal liability of individuals. There is no international law consensus about directly imposing liabilities on corporations as a matter of international law, and this is particularly the case in the two areas of international law that are most relevant to ATS claims: international criminal law and international human rights law. In international criminal law, where individuals can be subjected to criminal liability, States have never agreed, and no determination has ever been made, that corporations should be made similarly liable. None of the specialized war crimes tribunals have had the

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[14] Tom Bingham, *The Rule of Law* 112 (2010).

power to charge, let alone convict, a corporation of war crimes; and it is particularly significant that corporations were deliberately excluded from the jurisdiction of the International Criminal Court. In the area of international human rights, it is equally significant that treaties do not impose direct liability upon corporations. Instead, it is the party, i.e. States or, in some cases, international organizations,[15] that must "respect", "ensure" and "secure" the rights set out in those Conventions.

As the Oppenheim treatise explains,

> International law is the body of rules which are legally binding on States in their intercourse with each other. These rules are primarily those which govern the relations of States, but States are not the only subjects of international law. International organizations and, to some extent, also individuals may be subjects of rights conferred and duties imposed by international law.[16]

The Governments consider that a finding by a domestic court that companies are directly liable under customary international law for violations of the "law of nations", even in a narrow category of circumstances, would be a novel and erroneous interpretation of international law in this area. Compared with the evidence that exists to support the rule that certain international organizations and, in some

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[15] *See, e.g.*, the Convention on the Rights of Persons with Disabilities, *opened for signature* March 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008), to which the European Union is party.

[16] *Oppenheim's International Law* Vol. 1, 4 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992).

narrow cases, individuals, may be directly liable, there is no evidence that customary international law has developed to recognize the direct liability of a corporation.

The arguments to the contrary are not compelling. It is of course true that there are various examples of international treaties which impose obligations on States to create duties for corporations (such as the OECD Anti-Bribery Convention, the International Convention for the Suppression of Financing of Terrorism and many International Labour Organization conventions concerning employee rights and working conditions).[17] However, (i) they are directed to States as parties, and (ii) the duty of a corporation is to obey whatever rule of law is enacted by a State with proper jurisdiction over the corporation. The fact that a treaty requires States to impose particular obligations on corporations cannot convert those entities into legal persons on the international plane. Equally, without an intervening act of domestic law, an obligation owed by the State cannot be converted into one owed by a private party. Such sector-specific treaties do not suddenly create some *general direct duty* of corporations to obey the rules of international law imposed on States.

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[17] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *adopted* Dec. 17, 1997, 37 ILM 1 (entered into force February 15, 1999); International Convention for the Suppression of the Financing of Terrorism, *adopted* Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force April 10, 2002); The Equal Remuneration Convention, *adopted* June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953); The Abolition of Forced Labour Convention, *adopted* June 25, 1957, 320 U.N.T.S. 291 (entered into force January 17, 1959).

Petitioners argue that the fact that domestic legal systems generally impose tort liability on corporations within their own domestic systems indicates that customary international law recognizes corporate liability for international human rights violations. Brief for Petitioners at 43-47. But Petitioners confuse domestic law and international law.[18] When examining whether a legal principle has achieved international consensus through the practice of States and *opinio juris*, so as to have the status of a binding rule of international law, the Court should not be simply asking if different nations have imposed corporate liability for torts within their own borders. If there were evidence that it was common for States to impose liability on *foreign* corporations for torts committed *abroad* against *foreign* victims for human rights violations, believing that such corporate liability was required as a matter of international law, this could constitute evidence of customary international law. Instead, international reality is quite to the contrary.[19]

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[18] The point is well explained by Judge Friendly in *IIT v. Vencap Limited*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("we cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations" simply because "every civilized nation doubtless has this as a part of its legal system"). *See also*, Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 451 (2001) ("Domestic legal principles matter only to the extent they are shared by many different legal systems and even then, are subsidiary to treaties and customary law").

[19] Three judges of the International Court of Justice have recognized that the extraterritorial reach of the ATS "has not attracted the approbation of States generally." Judges Higgins, Kooijmans and Buergenthal, *Case Concerning Arrest Warrant of 11 April 2000 (DRC v. Belg.)*, 2002 ICJ 121, at ¶ 48 (Feb. 15). The House of Lords has also noted that the ATS' broad reach

B. International Criminal Law Recognizes the Liability of Natural, But Not Legal, Persons

Since World War II, the liability of individuals under international law has been established where they have engaged in the most serious crimes of concern to the international community. But such individual liability has been limited to criminal liability imposed on wrongdoing individuals by special tribunals beginning with the international military tribunals at Nuremberg and Tokyo. In fact, none of the specialized war crimes tribunals were given the power to charge, let alone convict, a corporation;[20] and corporations have been deliberately excluded from the jurisdiction of the International Criminal Court. *See* Rome Statute of the International Criminal Court, Art. 25(1), 2187 U.N.T.S. 90, 37 I.L.M. 1002 (July 17, 1998) ("Rome Statute"), Kai Ambos, *Commentary on the Rome Statute of the International*

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does not generally express principles shared by other nations. *Jones v. Saudi Arabia*, [2006] UKHL 26, ¶20, available at: http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf.

[20] Petitioners cite *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals 1132 (1948) ("the I.G. Farben case") for the position that corporations may be held criminally liable under international law. Brief for Petitioners at 50. But the statements of the court were dicta, as the tribunal's charter did not confer any jurisdiction over corporations, as Petitioners acknowledge. Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity* (Dec. 20, 1945). *See also* The Statutes for the International Criminal Tribunal of the Former Yugoslavia (Article 6) and the International Criminal Tribunal of Rwanda (Article 5) which provide only for jurisdiction over natural persons.

Criminal Court (O. Triffterer ed., 2008); Albin Eser, *Individual Criminal Responsibility*, in 1 *The Rome Statute of the International Criminal Court: A Commentary* 767, 778-79 (A. Cassese *et al.* eds., 2002).

The International Criminal Court Draft Statute of 1998 contained a proposal from France which would have subjected legal entities (and therefore, corporations) to the jurisdiction of the International Criminal Court "if the crimes were committed on behalf of such legal persons or by their agencies or representatives". This inclusion was proposed in order to make it easier for victims of crime to sue for restitution and compensation. According to a participant, this proposal was ultimately rejected in part because of "serious and ultimately overwhelming problems of evidence" which would confront the Court and because "there are not yet universally recognized common standards for corporate liability." Ambos, *supra*, p. 478. As University of Cambridge Law Professor James Crawford noted in an amicus brief in a similar case, "the episode is significant, concerning as it does the central international criminal law instrument of our time."[21]

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[21] *Brief of Amicus Curiae Professor James Crawford in Support of Conditional Cross-Petitioner, Presbyterian Church of Sudan v. Talisman Energy, Inc., cert. denied*, 131 S.Ct. 79 (2010) (No. 09-1262) (Brief filed June 23, 2010). *See also* the additional briefs by other Professors of International Law for cogent summaries of the state of customary international law: *Brief of Amicus Curiae Professor Christopher Greenwood, CMG, QC, in Support of Defendant-Appellee, Presbyterian Church of Sudan v. Talisman Energy, Inc.* 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) (Brief filed May 4, 2007); *Brief of Amicus Curiae Professor Malcolm N. Shaw in Support of Conditional Cross-Petitioner, Presbyterian Church of Sudan v. Talisman Energy,*

Furthermore, as Judge Leval explained in the Second Circuit, "[T]he whole notion of corporate criminal responsibility is simply 'alien' to many legal systems."[22] Thus, some major civil law countries (including Germany, Spain, Sweden, and Italy) employ administrative law remedies against corporations, even for serious wrongdoing that would be criminal if done by individuals.

In addition, several international law instruments that instruct States to exercise criminal jurisdiction for serious crimes of concern to the international community, establish such liability for individuals, and not corporations or other legal entities. Thus, Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides that persons committing genocide are to be punished "whether they are constitutionally responsible rulers, public officials, or private individuals."[23] In respect to war crimes, the 1949 Geneva Conventions provide for effective penal sanctions "for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions as defined by them.[24] In this

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Inc., cert. denied, 131 S.Ct. 79 (2010) (No. 09-1262) (Brief filed June 23, 2010).

[22] Pet. App. at 123 (2d Cir. 2008) (citation omitted) (Leval, J., concurring in judgment). *See also*, Report on "Corporate Culture as a Basis for the Criminal Liability of Corporations" for the Special Representative of the UN Secretary-General on Business and Human Rights, Feb. 2008, available at: http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

[23] Convention on the Prevention and Punishment of the Crime of Genocide, art. IV, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

[24] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

context, the Governments consider that criminal responsibility is clearly ascribed to individual combatants, and not corporations. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides for the crime of torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[25] The fact that some countries, when incorporating the Rome Statute into their domestic law, imposed criminal liability on legal persons for the group of crimes included in the Rome Statute, viz. genocide, crimes against humanity and war crimes, is, as such, not sufficient evidence to conclude that there is a positive rule of international law imposing direct criminal liability on legal persons, as opposed to individuals.

C. International Human Rights Law Grants Certain *Rights* to Individuals and Organizations, But It Only Imposes *Obligations* on States

While the law of international human rights confers rights upon individuals (and in some cases, corporations), it imposes obligations only on States.

Thus, Article 2 of the International Covenant on Civil and Political Rights requires each State Party to "respect and to ensure to all individuals within its territory, and subject to its jurisdiction" the rights set out in that treaty.[26] It is clear that UN human rights

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[25] United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85.

[26] International Covenant on Civil and Political Rights, art. 2, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). In this respect, the Governments

conventions were not intended to have any effect on relationships between private parties.

Similarly, the American Convention on Human Rights requires the State Parties to "ensure to all persons subject to their jurisdiction, the free and full exercise of those rights,"[27] and the African Charter on Human and Peoples' Rights requires Member States of the Organization of African Unity to "recognize the rights, duties and freedoms enshrined in this Charter and . . . undertake to adopt legislative or other measures to give effect to them."[28] The

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consider the Human Rights Committee was correct in its General Comment No. 31 which states that these "obligations are binding on States and do not, as such have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law." Commentary to the UN Guiding Principles suggests that "the legal foundation of the State duty to protect against business-related human rights abuse is grounded in international human rights law". The then Legal Adviser of the Foreign and Commonwealth Office wrote to the Special Representative of the UN Secretary General for Business and Human Rights on July 9, 2009, making clear the U.K. Government did not accept this premise, as many rights were not amenable to application between private persons (*see* http://www.reports-and-materials.org/UK-Foreign-Office-letter-to-Rugg ie-9-Jul-2009.pdf). *See also* letter from FCO Minister Jeremy Browne to the Special Representative, dated January 31, 2011, reiterating this point (*see* http://www.business-humanrights.org/media/documents/ruggie/browne-cover-ltr-to-ruggie-re-uk-govt-guiding-principles-comment-31-jan-2011.pdf).

[27] American Convention on Human Rights, art. 1, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978).

[28] African Charter on Human and Peoples' Rights, art. 1, *adopted* June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

European Convention on Human Rights also requires its High Contracting Parties to "secure to everyone within their jurisdiction, the rights and freedoms . . . in this Convention."[29] Accordingly, major international and regional human rights conventions clearly make responsibility for human rights a matter of State obligation.

The fact that international human rights law is predicated on the responsibility of States is underlined by the fact that the major dispute mechanisms for the enforcement of human rights have jurisdiction only over States. Although many allow claims to be brought by individuals and corporations, none provide for claims to be made against those entities.[30]

It is also notable that most human rights obligations are not easily transposed to non-State actors. Olivier De Schutter notes that this appears clearly from any attempt to apply the classical conditions that apply to a State when it interferes with human rights to a non-State entity such as a corporation (*e.g.*, justifying interferences with human rights by reference to legitimate "public interest" objectives).[31] Furthermore, many such rights simply have no application to non-State actors, such as those relating to the expulsion of aliens, equality before the courts,

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[29] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, *opened for signature* November 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

[30] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, *supra* note 29; and the International Covenant on Civil and Political Rights, Optional Protocol, art. 2, *supra* note 26.

[31] Olivier De Schutter, *International Human Rights Law* 399-403 (2010).

and the retroactive application of criminal law.[32] Ultimately, international human rights law as it currently stands is clearly intended to apply to the vertical relationship between the State and the individual, in which the State bears sole legal responsibility to respect individual rights, even though some cases may include a positive obligation to penalize the behavior of non-State actors. As Prof. Malcolm Shaw sets out in his *Talisman* brief,[33] it is notable that the UN Special Representative for Business and Human Rights himself concluded in an analysis of human rights treaties that "it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations."[34]

While recent years have seen a number of voluntary guidelines directed at corporations, these are non-binding and do not reflect the current state of customary international law. In fact, this is explicitly recognized in the two most well-known of these guidelines: (i) the commentary to the OECD Guidelines for Multinational Enterprises states: "The Guidelines . . . represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations

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[32] *See* letter from the then FCO Legal Adviser dated 9 July 2009, at footnote 26 above.

[33] *Supra*, note 21.

[34] Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 44, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007).

of these enterprises";[35] and (ii) the commentary to the more recent UN Guiding Principles on Business and Human Rights states: "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses."[36] Accordingly, neither set of guidelines supports a contention that customary international law has now developed to recognize the liability of corporations for human rights breaches.

In conclusion, the Governments respectfully submit that the Second Circuit's analysis of the non-liability of corporations under the "law of nations" is entirely correct and should be followed by this Court. Rules relevant to ATS claims that are embodied in international criminal law or international human rights law (the two areas on which ATS claims most often rest) currently do not impose direct obligations on corporations, but rather treat them as bodies created and regulated by national laws.

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[35] *OECD Guidelines for Multinational Enterprises*, p. 39, (2008) Org. for Econ. Cooperation and Dev., http://www.oecd.org/data oecd/56/36/1922428.pdf.

[36] John Ruggie, *Report of the Special Rep. of the S.G. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, p. 5, (March 21, 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

D. Protection Against Human Rights Abuses Can Be More Fairly and Effectively Done by Seeking International Consensus and Encouraging States to Enact Domestic Legislation Implementing their Obligations Under International Human Rights Instruments within their Jurisdiction

The task for governments concerned about human rights violations or abuses is to develop effective tools and pressures to ameliorate or eliminate such situations where they exist. National laws, including their interpretation and application by courts, are an important part of the response, as is diplomacy. International cooperative efforts have taken a variety of forms, ranging from human rights treaties, to (in the field of corporate activity) multilateral initiatives resulting in guidelines that are not legally binding. Such multilateral tools require cooperation among States trying to bring about progress and change.

It has been the longstanding view of the Governments that it is States, not other actors, which owe human rights obligations to non-State actors within their jurisdiction or, exceptionally, control under international law. Therefore, States can be held liable for breaches of their obligations in accordance with the jurisdictional provisions of the applicable law. This is not just a legal technicality: the Governments are concerned that, by recognizing the direct liability of non-State actors for violations of international human rights law, as well as by undermining the principle of national sovereignty in prevention, and punishment of, and redress for abuses, States might be given reason to downplay or even ignore their own international human rights law obliga-

tions. They will also not come under pressure to provide a remedy, and indeed prevent abuses, if plaintiffs have recourse to redress elsewhere.

Companies should not be able to act with impunity vis-à-vis human rights issues. The Governments have continued to recognize that the operations of companies can have both beneficial and detrimental impacts on the enjoyment of human rights by those affected by their operations.[37] In that regard, the Governments fully engaged in, and gave important support to, the work of the Special Representative on Business and Human Rights, John Ruggie,[38] and to the UN endorsement of his work, the UN Guiding Principles on Business and Human Rights.[39] The

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[37] For example, *see Business and Human Rights*, Foreign and Commonwealth Office, available at: http://www.fco.gov.uk/en/global-issues/human-rights/international-framework/business/; *see also* chapter on freedom and prosperity in Human Rights Memorandum of the Dutch Government 'Responsible for Freedom', available at: http://www.minbuza.nl/en/key-topics/human-rights/dutch-human-rights-policy/human-rights-strategy-2011.

[38] The Commission on Human Rights resolution 2005/69 endorsed by the Commission on Economic and Social Council on July 25, 2005. (Resolution 2005/273). John Ruggie was appointed by the Secretary-General on July 28, 2005.

[39] *See, e.g.*, U.K. Minister Jeremy Browne's letter of January 31, 2011, "warmly" welcoming the Principles, but also making clear his country's view that the principles are "policy guidelines, not all of which necessarily reflect the current state of international law", available at http://www.business-humanrights.org/media/documents/ruggie/browne-cover-ltr-to-ruggie-re-uk-govt-guiding-principles-comment-31-jan-2011.pdf. The Dutch government also supported the Ruggie Framework and lobbied for the endorsement of the Principles by the Human Rights Council in June 2011, as mentioned in the Human Rights Memorandum 'Responsible for Freedom', available at: http://www.minbuza.nl/

Governments also support international standards, such as the OECD Guidelines for Multinational Enterprises, which they believe can play an important role in the promotion of a corporate culture consistent with human rights.[40] The Governments continue to be committed to this process of multilateral dialogue.

To summarize, the Governments respectfully submit that it would be both inappropriate and undesirable for a domestic court to make a unilateral ruling, identifying a new rule of corporate liability based on customary international law. This would be particularly unfortunate if done now, when the question of how best to reduce the negative impacts of corporate activity on peoples' human rights, while ensuring the primary role of States for corporate regulation in their territory is maintained, is subject to ongoing multilateral deliberation (including in the UN Human Rights Council).

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en/key-topics/human-rights/dutch-human-rights-policy/human-rights-strategy-2011.

[40] *See Business and Human Rights Toolkit*, p. 5, Foreign and Commonwealth Office, available at: http://www.fco.gov.uk/en/global-issues/human-rights/international-framework/business/; and the *OECD Guidelines for Multinational Corporations*, Org. for Econ. Co-operation and Dev., available at: http://www.oecd.org/dataoecd/56/36/1922428.pdf; *see also* the explicit endorsement of the OECD Guidelines after their revision in 2011 by the Dutch Government at: http://www.rijksoverheid.nl/nieuws/2011/05/25/wereldwijde-richtlijnen-voor-verantwoordelijk-ondernemen.html.

III. A STATE IS FREE TO CREATE DOMESTIC TORT REMEDIES AGAINST ORGANIZATIONS FOR HUMAN RIGHTS ABUSES THAT WOULD BE ILLEGAL UNDER INTERNATIONAL LAW IF DONE BY A STATE – SO LONG AS A SUFFICIENT FACTUAL NEXUS EXISTS TO SUSTAIN JURISDICTION UNDER INTERNATIONAL LAW

The Governments, recognizing that obligations may be imposed on corporations in domestic law, and subject to any obligations on States as a matter of treaty law, believe that it is for each individual State to decide whether and how to regulate corporate activity within its territory and/or otherwise subject to its jurisdiction. This can be done under a number of domestic law heads (including tort, consumer regulation, criminal prohibitions, health and safety rules). Thus, it is certainly open to a State to create legal rules that make companies liable to pay compensation to private parties injured by legally prohibited activities by a company, including compensation for individuals injured by reasonably specified human rights abuses (whether or not described as such). However, as the Governments have repeatedly emphasized in prior amicus briefs, the right of the United States or any other sovereign to create and enforce such a domestic civil remedy depends on it being able to satisfy the *proper jurisdictional limits recognized by international law*.

If this Court decides that common law judges are entitled to create such a domestic remedy against corporations, this would be sufficient to resolve the Questions Presented in this case, but it would not be sufficient to resolve the case itself. The Governments

believe that there is no basis under international law for a U.S. court to exercise jurisdiction against the Respondents for the conduct charged in the complaint.

IV. THESE NUMEROUS A.T.S. ACTIONS AGAINST FOREIGN CORPORATIONS FOR FOREIGN ACTIVITIES EMPHASIZE THE IMPORTANCE OF THIS COURT PROMPTLY MAKING CLEAR THAT THE LOWER COURTS SHOULD NOT ALLOW ANY A.T.S. CASE TO PROCEED UNLESS IT CAN SATISFY THE BASIC LIMITATIONS ON NATIONAL CIVIL JURISDICTION IMPOSED BY INTERNATIONAL LAW

In *Empagran* and *Morrison*, this Court enunciated a clear presumption against a cause of action created by a federal statute being construed to allow suit in the U.S. courts by foreign plaintiffs for injuries suffered abroad. It emphasized the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 130 S.Ct. at 2877 (quoting *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 248 (1991)). This avoids the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran* 542 U.S. at 165 (2004). Thus, the question that needs resolution in the ATS area is whether the same presumption against exercise of extraterritorial jurisdiction on statutory claims applies equally to common law claims for "the modest number of international law violations with a potential for personal liability." *Sosa*, 542 U.S. at 724. The Governments respectfully

suggest that there is no reason to assume that federal judges making common law decisions would be less concerned about the jurisdictional limits imposed by international law than the Congress has been, or that judges should be less anxious "to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. *See also The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another.").

This Court has taken a careful approach to issues of civil jurisdiction. The traditional basis of jurisdiction under international law, as recognized by this Court, is territorial. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). Thus, each State may regulate activity that occurs within its own territory (the "territorial principle"). *Id.* This Court has also recognized that international law permits the exercise of prescriptive jurisdiction in relation to the conduct of its citizens, wherever located (the "nationality principle"). *See e.g. Blackmer v. United States*, 284 U.S. 421, 437 (1932). This Court has also allowed for exercise of U.S. extraterritorial jurisdiction under the sometimes controversial "effects doctrine," where overseas activities have had or were intended to have substantial effect within the United States. *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993); *see also, Empagran*, 542 U.S. at 164-165.[41] These "are parts of a single broad principle ac-

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[41] The Court relied on among other things, RESTATEMENT § 403(2) (jurisdiction based on "the extent to which the activity...has substantial, direct, effect upon or in the territory").

cording to which the right to exercise jurisdiction depends on there being *between the subject matter and the state exercising jurisdiction a sufficiently close connection* to justify that state in regulating the matter and perhaps also to override any competing rights of other states."[42] Despite this guidance, the lower courts appear to have gone further than the established jurisprudence allows. As this Court held in *Sosa*, the ATS only allows federal law claims for a narrow category of international law norms with no less "definite content and acceptance among civilized nations than the 18th-century paradigms" familiar when that statute was enacted. Nevertheless, the lower courts have both asserted jurisdiction with regard to a wider category of such violations, and in relation to facts in which a "sufficiently close connection" to the U.S. is entirely absent.

None of these jurisdictional principles supports the *Kiobel* case (or the *Rio Tinto* case). The alleged wrongs occurred entirely within a foreign territory and involved only foreign governments and nationals.

This is why the Government of the United Kingdom, along with the Government of Australia, urged this Court to grant certiorari in *Rio Tinto*, as that petition asks this Court to review two questions fun-

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The U.K. Government opposed the exercise of the "effects doctrine" jurisdiction in the *Hartford Fire* case. *Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners, Hartford Fire Ins. Co. v. California*, (Brief filed November 19, 1992) (Nos. 91-1111, 91-1128), 1992 U.S. S.Ct. Briefs LEXIS 774.

[42] *Oppenheim's International Law* Vol. I, 457-8 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992) (emphasis added).

damental to the proper resolution of the typical ATS claim.[43] These questions ask the Court to (i) make clear the jurisdictional limits under international law that apply to a dispute among alien parties concerning non-U.S. activities under the ATS, and (ii) determine whether the international law doctrine of "exhaustion of local remedies" should be applied even where there would be sufficient factual nexus to sustain U.S. jurisdiction under international law. The Governments of the Kingdom of the Netherlands and the United Kingdom urge the Court to provide guidance on both issues by granting certiorari in that case.

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[43] *See Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Petitioners on Certain Questions Raised in the Petition for Certiorari, Rio Tinto PLC v. Alexis Holyweek Sarei*, (No. 11-649) (Brief filed December 28, 2011). In this brief, the U.K. Government also dealt with "the basic principles of international law requir[ing] that . . . the claimant must have exhausted any remedies available in the domestic legal system" which this Court anticipated in *Sosa* and confirmed that "would consider this requirement in an appropriate [ATS] case." 733 at n. 21. *See Brief* at 16-18. The Governments' position is that this "well-established rule of customary international law," (*Switzerland v. U.S.*, 1959 ICJ Rep. 6, 27 (Mar. 21)), should be complied with. Moreover, as explained in the brief, the application of the "exhaustion of local remedies" principle only becomes relevant (as an additional threshold requirement) where the District Court has found that an ATS claim both (i) has sufficient factual nexus to the U.S. to satisfy the minimum public international law limits on the exercise of domestic jurisdiction by U.S. courts and (ii) falls within the narrow class of international wrongs foreseen by this Court in *Sosa*. *Brief* at 17. In the Governments' view, taking such an approach would further reduce the risk of jurisdictional overreaching in ATS cases, while implementing this Court's broader concerns about comity and international law in *Empagran*, *Sosa* and *Morrison*.

These questions are pertinent, as the attractiveness of the United States as a forum for foreign plaintiffs is well known and may, in part, be traced to decisions by the United States to accord private plaintiffs a set of advantages that most other countries have not accepted. Those advantages are very familiar to this Court. First, the so-called "American rule" on litigation costs requires each side to bear its own costs – rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's costs; and generally broader discovery available to plaintiffs in the United States will tend to drive up the non-reimbursable litigation costs that defendants will have to bear. Secondly, the right to a jury trial in a civil case, guaranteed by the Seventh Amendment to the U.S. Constitution, is generally not available elsewhere. Thirdly, the "opt out" class action system, provided for in the United States under Rule 23 and its state law counterparts, has not been accepted by most other countries. Fourthly, punitive damages are available in the United States, but generally are not allowed elsewhere.

In sum, the international law jurisdictional question is an even broader and more fundamental issue in ATS cases than the "corporate liability" issues present in the present case, and it will remain a key issue until resolved, however the Court decides the present case. The issue would become especially urgent should the Court decide there is corporate liability in the present case, as Petitioners urge.

Respectfully submitted,

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